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In the Supreme Court of the United States

OCTOBER TERM, 1985

RALPH ROGER BERGMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Bergman v. *United States*, No. 84-78 (Ct. Cl. June 16, 1982), aff'd, 706 F.2d 319 ..... 2, 3

Leib v. *Veterans Administration*, 546 F. Supp. 758 6

Nagel v. *United States Dep't of Health, Educ. & Welfare*, 725 F.2d 1438 ..... 4, 6

Rogers v. *United States Dep't of Labor*, 607 F. Supp. 697 6

Turner v. *Dep't of the Army*, 447 F. Supp. 1207, aff'd, 593 F.2d 1372 6

Statutes:

Privacy Act, 5 U.S.C. 552a 1, 3

5 U.S.C. 552a(d)(2) 3

5 U.S.C. 552a(d)(3) 3, 4, 6

5 U.S.C. 552a(g)(1)(A) 4, 5, 6

5 U.S.C. 552a(g)(1)(C) 4, 5

5 U.S.C. 552a(g)(1)(D) 4

5 U.S.C. 552a(g)(4) 4

5 U.S.C. 552a(g)(5) 1, 3

28 U.S.C. 2501 2

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This case is part of a continuing effort by petitioner, a former employee of the United States Department of Commerce, to obtain retroactive amendments of the official position descriptions for several of the positions he held while employed by the Department. In this action, petitioner alleged that the Department had violated the Privacy Act, 5 U.S.C. 552a, by refusing to amend his former position descriptions.[1] Petitioner sought injunctive relief and $200,000 in damages. The courts below held that petitioner's suit was barred by the Privacy Act's two-year statute of limitations (5 U.S.C. 552a(g)(5)).

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[1]In addition to the present action and the Court of Claims litigation discussed herein, petitioner has recently filed another suit under the Privacy Act, based on the same underlying facts, in another district court. *Bergman* v. *United States,* Civ. No. 85-1888 (D.D.C. filed June 10, 1985).

1. Petitioner was employed by the Department of Commerce from 1962 until 1977, when he took a disability retirement. Petitioner was twice separated from employment as a result of reductions in force (RIFs) at the Department; the first separation lasted for a few months in 1968 and the second occurred between 1973 and 1975. Petitioner challenged, administratively and before the former Court of Claims, the actions taken with respect to him in both RIFs. One of petitioner's many contentions was that inaccuracies in the official descriptions of his duties at various times prejudiced his ability to avoid separation by transferring to other positions for which he claimed to have been qualified. The Court of Claims rejected petitioner's challenge, ruling that the claim based on the 1968 RIF was barred by the applicable six-year statute of limitations (28 U.S.C. 2501) and upholding on the merits the underlying actions of the Department of Commerce and the former Civil Service Commission with respect to the 1973 RIF. *Bergman* v. *United States,* No. 84-78 (June 16, 1982), aff'd, 706 F.2d 319 (Fed. Cir. 1983) (Table).[2] In particular, the Court of Claims noted that petitioner had never, while employed by the Department, undertaken a formal classification appeal under available procedures (slip op. 27) and that, in any event, petitioner had suffered no prejudice as a result of the challenged position descriptions (*id.* at 29).[3]

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[2]With respect to various other claims raised by petitioner in the Court of Claims litigation, the court held that it lacked jurisdiction to order petitioner's reinstatement or to award retroactive back pay based on petitioner's claim that every position he had held since 1968 should have been classified at a higher grade level. *Bergman,* slip op. 23. These rulings are not at issue in the instant litigation.

[3]The court's conclusion was based on the fact that the Civil Service Commission had earlier reviewed petitioner's position descriptions, found them insufficiently detailed in certain respects, and ordered them corrected. As a result of the corrections, it was determined that, at the

In October 1982, petitioner filed the present action in the United States District Court for the District of Colorado. Petitioner's factual allegations were the same as before, but, for the first time, he based his claim on the Privacy Act, 5 U.S.C. 552a. In addition to damages, petitioner sought an injunction ordering the amendment of the position descriptions in his personnel records. Even at the time of filing this action, however, petitioner had not yet filed a formal administrative request for amendment of his records, as provided for in subsections (d)(2) and (d)(3) of the Privacy Act, 5 U.S.C. 552a(d)(2) and (d)(3). Petitioner made such a request on March 22, 1983, and the request was finally denied on June 10, 1983.

After allowing petitioner to amend his complaint to reflect the formal Privacy Act request and denial, the district court granted the government's motion for summary judgment (Pet. App. 7-18). The court held that petitioner's Privacy Act claims were barred by the Act's two-year statute of limitations (5 U.S.C. 552a(g)(5)) (Pet. App. 13-18). The court of appeals affirmed (*id.* at 1-7).[4]

2. Despite petitioner's extravagant claims that the decision below is "dangerously wrong" and will be a "beacon for discord" (Pet. 7, 8), the decision of the court of appeals is

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time of the 1973 RIF, petitioner was qualified for electronics engineering positions at the GS-7 level. Such a position was subsequently offered to and accepted by petitioner in 1975, with back pay and other benefits restored for the period dating from the 1973 RIF. *Bergman*, slip op. 28-29. Petitioner has persisted in his complaints, however, because the position he was offered and accepted in 1975 was not the one he wanted.

[4]The court of appeals also affirmed the district court's grant of summary judgment to the government on petitioner's separate action under the Federal Tort Claims Act, which was again based on the same underlying facts (Pet. App. 5-7). Petitioner does not challenge that ruling in this Court.

correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

a. Petitioner's basic argument is that the lower courts erroneously held that the Privacy Act's statute of limitations begins to run even before the requestor has exhausted his administrative remedies (Pet. 10, 12-13). If this were a correct statement of the holding below as applied to the facts of this case, we might agree with petitioner that the result could be considered anomalous. But petitioner has failed to distinguish his two separate causes of action under the Privacy Act, and he has utterly failed to acknowledge his own dilatory conduct in raising his Privacy Act claims. When placed in proper context, it is clear that the court of appeals correctly decided this case.

As an initial matter, it is important to understand the distinction between actions for damages and actions for injunctive relief under the Privacy Act. Subsection (g)(4) of the Act, 5 U.S.C. 552a(g)(4), when read in conjunction with subsections (g)(1)(C) and (g)(1)(D), 5 U.S.C. 552a(g)(1)(C) and (g)(1)(D), authorizes individuals who have been subjected to adverse determinations or actions as a result of an agency's failure properly to maintain its records or otherwise comply with the Act to bring an action for damages. The right to maintain such an action is not tied to any specific administrative procedures, but is instead triggered by adverse agency actions or other adverse effects resulting from violations of the Act's substantive provisions. See *Nagel* v. *United States Dep't of Health, Educ. & Welfare,* 725 F.2d 1438, 1441 n.2 (D.C. Cir. 1984). On the other hand, subsection (g)(1)(A) of the Act, 5 U.S.C. 552a(g)(1)(A), authorizes an individual to bring an injunctive action seeking the correction of records. Such an action is specifically tied to the administrative procedures for the correction of records provided in subsection (d)(3), 5 U.S.C. 552a(d)(3). *Nagel,* 725 F.2d at 1440-1441.

The basis for petitioner's argument is his apparent belief (Pet. 12) that the statute of limitations for *all* of his claims did not begin to run until the completion of administrative procedures, even if, as in the case of his claim for damages, there were no administrative procedures to exhaust. This erroneous premise, for which petitioner cites no authority, was correctly rejected by the courts below. The court of appeals recognized (Pet. App. 4) that the gist of petitioner's complaint was a claim for damages under subsection (g)(1)(C), on the theory that the allegedly incorrect position descriptions led to the Department's adverse determinations with respect to petitioner's employment. The court held (Pet. App. 4-5) that the limitations period for such a claim begins upon the adverse determination in question or at such later time as the claimant knew or should have known of that adverse determination. The court of appeals recognized (Pet. App. 5) that running the limitations period for damages actions under the Privacy Act from any event other than the underlying adverse determination—such as the subsequent adjudication in the Court of Claims or petitioner's belated formal invocation of the Privacy Act—would allow plaintiffs to extend or even revive the limitations period at will. Accordingly, since the adverse determinations in this case took place years ago—in 1968 and 1973—the statute of limitations had long since expired when the present action was filed.[5]

b. Although the court of appeals did not explicitly address petitioner's claim for injunctive relief under subsection (g)(1)(A), 5 U.S.C. 552a(g)(1)(A), the court's implicit rejection of that claim was amply justified. The underlying

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[5]As the court of appeals pointed out (Pet. App. 4), the result is the same even if one indulges petitioner so far as to assume that the statute of limitations did not begin to run until the Department of Commerce denied petitioner's post-retirement request for retroactive reclassification, made in October 1977.

records that petitioner seeks to have corrected—position descriptions pertaining to petitioner's work while employed at the Department of Commerce—date from 1962 to 1977. Petitioner waited five years from the creation of the latest record in question to file this Privacy Act suit, and he did not invoke the Act's administrative procedures until after this action was pending.

We agree with petitioner's assertion (Pet. 12) that a person seeking review under subsection (g)(1)(A) of an agency's decision not to correct contested records must, prior to litigation, exhaust the administrative procedures set forth in subsection (d)(3). See *Nagel,* 725 F.2d at 1441. That principle is not implicated here, however, because of petitioner's failure to take *any* action to invoke the Privacy Act's administrative procedures within the period specified for the bringing of suit. As with his claim for damages, acceptance of petitioner's argument in the context of his action for injunctive relief would make a nullity of the Privacy Act's statute of limitations by permitting a litigant to stave off the running of the two-year period by waiting indefinitely to invoke the Act's administrative procedures. Petitioner has advanced no plausible basis for such a construction of the Act.[6]

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[6]In any event, it is questionable whether petitioner has stated a claim cognizable under the Privacy Act, because the relief he seeks is the amendment of subjective personnel classifications, for which other administrative relief was available. See *Rogers* v. *United States Dep't of Labor,* 607 F. Supp. 697 (N.D. Cal. 1985); *Turner* v. *Dep't of the Army,* 447 F. Supp. 1207, 1212 (D.D.C. 1978), aff'd, 593 F.2d 1372 (D.C. Cir. 1979) (Table); cf. *Leib* v. *Veterans Administration,* 546 F. Supp. 758, 761-762 (D.D.C. 1982) (citation omitted) (Privacy Act not intended to be a " 'backdoor mechanism' to subvert the finality of agency determinations.").

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Acting Solicitor General

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